Supreme Court, U.S.
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No. 96-1987

In the Supreme Court of the United States

OCTOBER TERM, 1996

NIPPON PAPER INDUSTRIES CO., LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order dismissing the indictment in this case for failure to state an offense under Section 1 of the Sherman Act, 15 U.S.C. 1.

1. On December 13, 1995, a federal grand jury sitting in the District of Massachusetts returned a two-count indictment charging that petitioner and its predecessor corporation conspired to increase the price of thermal facsimile ("fax") paper sold to customers in the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 3a-4a. The indictment alleges that in 1990 petitioner and other fax paper manufacturers held a series of meetings in

Japan that resulted in an agreement to increase the price of fax paper sold in North America. *Ibid.* The indictment alleges that petitioner and the other manufacturers "directed their co-conspirator trading houses to implement price increases to fax paper customers in North America" (*id.* at 52a), and "monitored the trading houses' transactions with the North American customers to ensure that the agreed upon prices were charged" (*id.* at 53a). The indictment also alleges that petitioner "sold approximately $6.1 million dollars of fax paper for import into North America" in 1990 (*id.* at 51a) and that petitioner's conduct "had a direct, substantial and reasonably foreseeable effect on import and domestic commerce" (*id.* at 54a).

On September 3, 1996, the district court granted petitioner's motion to dismiss the indictment. Pet. App. 30a-49a. The district court found that the indictment lacked allegations of conspiratorial conduct within the United States. *Id.* at 42a-45a. The court also held that a criminal Sherman Act charge may not be based on conduct occurring wholly outside the United States. It rejected the government's reliance on *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 796 (1993), in which the Court deemed it "well established * * * that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States," because *Hartford* involved a civil, not criminal, antitrust action. Pet. App. 45a-49a.

On March 17, 1997, the court of appeals reversed and remanded. Pet. App. 1a-29a. The court of appeals observed that the same substantive language of Section 1 of the Sherman Act governs both civil and criminal cases. *Id.* at 9a. The court thus concluded

that this Court's decision in *Hartford* is controlling here and required it to give Section 1 a comparable reach in a criminal prosecution. *Id.* at 19a.

2. Petitioner contends (Pet. 11-12) that the court of appeals erred by holding that Section 1 of the Sherman Act authorizes a criminal prosecution based on "wholly foreign conduct carried out by foreigners," and by applying this Court's construction of the Sherman Act in *Hartford* (a civil case) to this criminal prosecution.

The court of appeals' holding that Section 1 of the Sherman Act authorizes a criminal prosecution based on wholly extraterritorial conduct represents the first decision of an appellate court to address that issue. Review of that holding, which accords with the Court's construction of Section 1 in the civil context, is not warranted. In addition, whatever the merits of petitioner's contentions, they are not yet ripe for review by this Court. The decision of the court of appeals places petitioner in precisely the same position it would have occupied if the district court had denied its motion to dismiss. If petitioner is acquitted following a trial on the merits, its contentions will be moot. If, on the other hand, petitioner is convicted and its conviction is affirmed on appeal, it will then be able to present its contentions to this Court, together with any other claims it may have, in a petition for a writ of certiorari seeking review of a final judgment against it. Accordingly, review by this Court of the decision of the court of appeals would be premature at this time.*

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER DELLINGER
Acting Solicitor General

JULY 1997